United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2391
74-2441

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 74-2391, 74-2441

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN E. COUGHLIN and PETER A. PEPE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

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JOHN E. COUGHLIN and PETER A. PEPE,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John E. Coughlin and Peter A. Pepe appeal from judgments of conviction entered on October 23, 1974, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 74 Cr. 104, filed on January 31, 1974, charged John E. Coughlin and Peter A. Pepe in four counts with conspiracy to rob and the armed robbery and larceny of the Empire National Bank, Hyde Park, New York, on October 30, 1972, in violation of Title 18, United States Code, Sections 371 and 2113(a)(b) and (d). Trial commenced on September 10, 1974 and concluded on September 16, 1974 when the jury found the defendants guilty on all counts. On October 23, 1974, Judge Frankel sentenced

each defendant to a single term of imprisonment of five years, treating all four counts as a single offense for purposes of imposing sentence. The defendants are serving their sentences.

Statement of Facts

The Government's Case

Several tellers from the Empire National Bank testified that on October 30, 1972, at approximately 11:30 a.m., three men wearing ski masks and solid-colored raincoats entered the bank and commanded them to lie on the floor. The tellers testified that while they lay prostrate on the floor, one of the robbers vaulted the tellers' counter, another raced around the tellers' counter and the third, holding a long-barreled pistol, stood guard in the lobby. The two robbers behind the tellers' counter quickly emptied the cash drawers of paper money, later determined by an audit to be $31,000. Within minutes of their entry, the three were gone, driving away in a large green car with a black vinyl top.

Responding to the robbery alarm, Agent Heinz Eisele of the Federal Bureau of Investigation testified that he discovered a large green Mercury with a black vinyl top, motor running, abandoned in the parking lot of an A & P supermarket two blocks from the bank (Tr. 98-100). No fingerprints were found in the car or at the bank (Tr. 352).

Walter Burton, named as an unindicted co-conspirator, testified that he was one of the three participants in the armed robbery of the Empire National Bank on October 30, 1972.* He identified the other two robbers as appellants

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* Walter Burton was apprehended by the FBI on November 16, 1972, after a wild car-truck chase and shooting spree which followed Burton's armed robbery of a bank in New Haven, Connecticut. Charged in four Federal indictments with five bank

[Footnote continued on following page]

Pepe and Coughlin. Burton testified that the week before the robbery he had met with appellants at Pepe's home in New Haven, Connecticut, where the three discussed robbing a small bank in Hyde Park, New York. Following that meeting, they drove in Coughlin's Cadillac to Hyde Park where, Burton testified, Coughlin explained the details of the robbery plan. Coughlin pointed out the bank, which each separately entered and "cased". Coughlin then drove along the proposed getaway route, a circuitous five-block route running from behind the bank through residential streets to the parking lot of an A & P supermarket, which Coughlin had selected as the site where they would switch from the get-away car to their own cars. Satisfied with the plan, Burton asked how they had come upon the bank. Coughlin said he had learned of the bank while visiting his brother, who had gone to school in the immediate area (Tr. 124-128A).

The following Sunday night, October 29, 1972, the three men again met at Pepe's house. Pepe laid out the robbery equipment: blue Navy watch caps with eyeslits already cut; solid-colored raincoats; cotton gloves; pillow cases; a dent puller; and three loaded handguns—a .44 Magnum, a .32 revolver and a .32 pistol. Burton placed the equipment in a canvas bag and stashed the bag in the trunk of a Volkswagen borrowed from his girlfriend, Gwen Fortman. Burton and appellants agreed to meet early the next morning near Waterbury, Connecticut for the trip to Hyde Park. (Tr. 128A-31)

The next morning at approximately 8:20 a.m., they met at a luncheonette near Waterbury and left together for

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robberies, and in a Connecticut indictment with seven counts of attempted murder, Burton pled guilty to all charges and was sentenced in 1973 to a Federal term of imprisonment of 32 years and to a Conneceticut term of imprisonment of 16 to 32 years, the latter to run concurrently with the Federal sentence. (Tr. 112-22).

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Hyde Park, Burton in the Volkswagen and Coughlin and Pepe in Coughlin's Cadillac. On reaching Hyde Park, they drove to the A & P parking lot where Burton left the Volkswagen. Coughlin then drove to a school parking lot three miles south of Hyde Park to steal a getaway car. Using the dent puller, Pepe removed the ignition from a green Mercury, with a vinyl top, and drove it back to the A & P parking lot followed by Coughlin and Burton. At the parking lot, they left Coughlin's Cadillac, and the three continued on in the stolen Mercury to the Empire bank. En route they donned their raincoats, gloves and masks. After parking the Mercury adjacent to the bank, the three men ran single file into the bank. Burton testified that while he stood guard in the lobby, displaying the .44 Magnum, Pepe vaulted and Coughlin ran around the tellers' counters, scooped up all the paper money and stuffed it into pillow cases pinned to their raincoats. Unable to get into the vault, the three ran out, drove the Mercury along the getaway route back to the A & P parking lot, switched to the Cadillac and Volkswagen and left Hyde Park for Connecticut. (Tr. 131-39)

Some 45 minutes later, Burton rejoined Coughlin and Pepe, who had switched to Pepe's Chevrolet, at the Stratford Motor Inn in Stratford, Connecticut. There Coughlin registered for a room and the three entered it to divide up the loot. Before they could do so, however, Burton testified that he answered a telephone call to the room from the motel clerk who inquired how many people were staying in the room. Minutes later the three noticed through the room window that someone was in the parking lot writing down the license plate numbers of their cars. Understandably wary, Burton testified that they decided to leave and drove to a Howard Johnson's motel, located about twenty-five minutes away by car from the Stratford Motor Inn. Coughlin again registered for a room where they counted their take, $31,000, and divided it equally. (Tr. 39-45).

Other evidence, corroborating Burton's testimony, established that Coughlin's younger brother had attended high school in 1960-61 at the Eymard Seminary, located 4 blocks from the bank directly along the getaway route. (Tr. 230; GX 6)

A fingerprint expert from the Federal Bureau of Investigation, Claude Sparks, testified that he found Coughlin's fingerprints on a registration card of the Howard Johnson Motor Lodge in Stratford, Connecticut, date-stamped October 30, 1972 at 2:41 p.m. and made out in the name of William Wise. (Tr. 240-41, 251; GX 7, 8).

Robert Corcoran, manager of the Stratford Motor Inn, identified a picture of Coughlin as the man who signed as John Ford on a registration card date-stamped 1:43 p.m., October 30, 1972, (Tr. 317, 320, 327, 334-37) (GX 13, 14). Corcoran testified that he became suspicious after Coughlin had registered and followed Coughlin to the parking lot, where he noticed Coughlin standing with two or three other men next to two cars, a Volkswagen and a Chevrolet, neither of which bore the license plate number written by Coughlin on the registration card. Corcoran made note of the license plate numbers of both cars on the card. (Tr. 321-323, 342) The license plate numbers written by Corcoran were shown to be for Gwen Fortman's Volkswagen and for a Chevrolet registered to Pepe's wife, Rhonda (GX 16, 17). Corcoran testified he also recalled placing a telephone call to that room inquiring how many people were planning to stay there. (Tr. 322-24).

The Defense Case

Neither Coughlin nor Pepe testified. Each called witnesses, however, to establish an alibi for the day of the robbery.

1. Coughlin's Alibi.*

Florence Stefane, Coughlin's former girlfriend, testified that during 1972 she had been a barmaid at the Ramada Inn in West Haven, Connecticut, where she had met Coughlin (Tr. 385). She testified that she distinctly recalled having a conversation at her job with Coughlin on October 24, 1972 and telling him that she was depressed because October 24 would have been her thirteenth wedding anniversary were she not divorced. (Tr. 386-87) Coughlin asked her for a date for Sunday, October 29, 1972 (Tr. 391).

According to Mrs. Stefane, she spent all day Sunday, October 29th with Coughlin. After seeing a movie in the afternoon, they returned to her house, where Coughlin stayed past midnight watching television (Tr. 392-96).

Mrs. Stefane testified that the next morning, October 30, 1972, Coughlin picked her up about 9:30 a.m. in Pepe's Chevrolet, explaining that he was having trouble with his own car. From her house they drove to Pepe's house in New Haven where they coffee "clatched" with Pepe and his wife, Rhonda. After coffee, Mrs. Stefane testified, she and Coughlin drove in Pepe's car to a nearby restaurant where they ate lunch. About 1:00 p.m., Mrs. Stefane testified, they left the restaurant and Coughlin took her for a short ride. Seeking a little privacy, Mrs. Stefane testified, they made an impromptu stop at the Stratford Motor Inn. Coughlin registered while Mrs. Stefane remained in the car. Before going to the room, Mrs. Stefane testified, Walter Burton drove up in a Volkswagen, parked beside Pepe's Chevrolet and spoke briefly

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* Coughlin also called a witness Anderson Atkinson, who testified he knew Burton from Sommers prison. Atkinson testified he had a conversation with Burton while in prison in which Burton told of his plan to falsely implicate some people, including a "Tinkerbell" (Burton knew Coughlin as "Tinker"), in his various bank robberies to protect himself from the real perpetrators and to help himself with the authorities. (Tr. 367-72).

with Coughlin outside the car. A short time later, Mrs. Stefane testified, Burton came and knocked on the door of their room asking to use the room for a half hour. Coughlin refused and Burton left. Upset by the intrusion, Mrs. Stefane testified that she and Coughlin left that motel and Coughlin drove over to the Howard Johnson Motor Lodge and registered for another room there. They stayed there undisturbed for an hour and then returned to her house to greet her four children, who would be home from school. (Tr. 399-404, 411-19).

Mrs. Stefane also testified that Burton had once threatened Coughlin in the bar over a woman (Tr. 407).

On cross-examination, Mrs. Stefane admitted that Coughlin was arrested for the Empire Bank robbery at her house in the fall of 1973. She also admitted that she had told the FBI agents who came to arrest him that he was not in the house. In explanation, she testified that she had been in the house only two minutes before the FBI agents knocked on the door and was simply unaware that Coughlin was there. (Tr. 440-42).

2. Pepe's Alibi.

Rhonda Pepe, Pepe's wife, testified that she recalled that on the morning of October 30, 1972, Pepe had asked her to give Coughlin their car because Coughlin's car was stuck. She did so. Mrs. Pepe testified that later that morning Coughlin returned to their house with Florence Stefane and they had coffee together. Coughlin and Mrs. Stefane then left in Pepe's Chevrolet. (Tr. 473-74) At approximately 1 p.m., Mrs. Pepe testified, her sister, Nancy Iannone, arrived and they went shopping. Mrs. Pepe testified she returned to her home at 2:30 p.m. and found that her husband was still there. (Tr. 474-78).

Mrs. Pepe testified that she knew Walter Burton. She testified that he visited her husband at the house at irregular intervals in 1972, but she did not recall him visiting there during the month of October. (Tr. 478).

Nancy Iannone testified that she also recalled that shopping trip on October 30, 1972 with her sister. She testified that on that day she drove over to the Pepe home and picked up her sister to go shopping. She recalled seeing Peter Pepe, who, she testified, remained in the house after the two of them left. (Tr. 494-99).

On cross-examination both women admitted that in 1972 they frequently got together during the week, often to make shopping trips together. (Tr. 486-87, 500-01)

The Government's Rebuttal Case.

On rebuttal, the Government called two of the FBI agents, George Phillips and Gary McWhorter, who had arrested Coughlin at Florence Stefane's house on October 9, 1973. Their testimony established that Mrs. Stefane was in the house for approximately one and one-half hours before they knocked on the door, identified themselves as FBI agents and told Mrs. Stefane they were there to arrest Coughlin for a bank robbery in Hyde Park. Mrs. Stefane at first refused to let the agents in, claiming Coughlin was not there. After some time elapsed, Mrs. Stefane permitted the agents to enter and search her house, but she still claimed that Coughlin was not there. After a fruitless search of the basement, first floor and second floor of the house, Agent Phillips spotted a small rectangular hole located in the ceiling of a bedroom closet. Unable to reach the ceiling on foot, and finding no ladder or other means of entry, Agent Phillips obtained a chair. Assisted by others, he stood on the back of the chair, removed the cover, stuck his head up into the pitch-black of the attic and, shining a flashlight, called out Coughlin's name. He received no answer. Undeterred, but too big to crawl into the attic, Agent Phillips recruited a smaller agent to crawl into the attic. After a scuffle, Coughlin was removed from a hiding place behind a partition in one corner of the attic. (Tr. 510-17).

ARGUMENT

POINT I

Judge Frankel's failure to specifically instruct the jury on the appellants' alibi defenses was not error.

Both Coughlin and Pepe contend that it was reversible error for Judge Frankel not to instruct the jury specifically on their alibi defenses and the effect of such defenses on the Government's burden of proof. The contention is wholly without merit. No written request for an alibi instruction was submitted to the trial judge by either appellant. The oral request for such an instruction by counsel for Coughlin was *specifically withdrawn*. Furthermore, withdrawal of this request was made after consultation and with the consent of Pepe's counsel (Pepe Br. at 15 n.). Finally, neither defendant took proper exception to the trial court's charge on the ground that it failed to include an instruction on the alibi defenses. In light of all the circumstances, no error was committed.

Prior to summations, the District Court reviewed the requests to charge with counsel. Near the end of this session, the following colloquy occurred between Judge Frankel and counsel for Coughlin, in which the latter first requested an alibi instruction and then withdrew the request. (Tr. 558-59):

> Mr. Thau: Your Honor, since you took care of requests, and I must apologize for not having submitted any, the reason I didn't is because I have experienced or enjoyed, I should say, your Honor's charge before.
>
> What I will ask here, and this is not something esoteric which I think much preparation is needed for, is an alibi charge to the effect that they may

find that alibi is sufficient to create a reasonable doubt where it otherwise wouldn't have been.

* * * * *

The Court: . . .

As to your request about alibi, it seems to me that I can't give it to you both ways. If I grant that, I am going to give the thing about flight and the use of false names.*

Mr. Thau: *In that case I withdraw it.*

The Court: If you withdraw it, then I let it go at that. I am not sure I would give it to you anyhow, but I was trying to show you the implications of your position from my point of view (emphasis added).

When the trial court thereafter charged the jury, it did not specifically refer to the appellants' alibi defenses.

> "[T]he defendant must tender an instruction that is appropriate in form and substance . . . Where he fails to accomplish this, the court is not obligated to give an instruction unless a particularly sensitive defense is involved . . . or the facts adduced at trial are so complex and confusing that an understanding of the issues would be beyond the grasp of the jury." *United States* v. *Leach,* 427 F.2d 1107, 1112-13 (1st Cir.), *cert. denied,* 400 U.S. 829 (1970); see *United States* v. *Cantu,* 501 F.2d 1019, 1021 (7th Cir. 1972); *United States* v. *Esquer,* 459 F.2d 431, 434-35 (7th Cir. 1972), *cert. denied,* 414 U.S. 1006 (1973); *Apel* v. *United States,* 247 F.2d 277, 282 (8th Cir. 1957).

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* Judge Frankel had previously denied Government requests to instruct the jury that it could find consciousness of guilt from evidence of flight and concealment and the use of false names (Tr. 547-48, 556).

"Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request." *United States* v. *Caci*, 401 F.2d 664, 670 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969); *see Goldsby* v. *United States*, 160 U.S. 70, 77 (1895); *United States* v. *Harris*, 458 F.2d 670, 678 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972); *Roper* v. *United States*, 403 F.2d 796, 798 (5th Cir. 1968); *Lewis* v. *United States*, 373 F.2d 576, 579 (9th Cir.), *cert. denied*, 389 U.S. 880 (1967); *Holm* v. *United States*, 325 F.2d 44, 45 (9th Cir. 1963); *United States* v. *Stirone*, 311 F.2d 277, 281-83 (3rd Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); *Guthrie* v. *United States*, 207 F.2d 19, 24 (D.C. Cir. 1953); *United States* v. *Tramaglino*, 197 F.2d 928, 932 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952).

Appellants' alibi defenses in this case were not "particularly sensitive" defenses, see *Tatum* v. *United States*, 190 F.2d 612, 614-16 (D.C. Cir. 1951), nor were they complex or difficult to understand. Furthermore, the charge, taken as a whole, fully expressed the legal principles applicable to the defense and instructed the jury that the Government must prove each element of the crimes charged beyond a reasonable doubt. *See Guthrie* v. *United States*, 207 F.2d 19, 24 (D.C. Cir. 1953); *cf. United States v. Erlenbaugh*, 452 F.2d 967, 975 (7th Cir. 1971), *aff'd*, 409 U.S. 239 (1972). See also *United States* v. *Hamilton*, 420 F.2d 1096, 1098-99 (7th Cir. 1970); *United States* v. *Bessesen*, 445 F.2d 463, 468 (7th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Napue*, 401 F.2d 107, 110-12 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *United States* v. *Kahaner*, 317 F.2d 459, 477 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

In each of the cases cited by appellants where it was held reversible error for the trial judge not to instruct the jury as to an alibi defense, the defendant had requested such an instruction. *United States* v. *Booz*, 451 F.2d 719, 722-24 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820 (1973);

United States v. *Megna*, 450 F.2d 511, 512-13 (5th Cir. 1971); *United States* v. *Barrasso*, 267 F.2d 908, 910-11 (3rd Cir. 1959); *United States* v. *Marcus*, 166 F.2d 497, 503-04 (3rd Cir. 1948).

While Coughlin's attorney orally requested * a charge on the alibi defense during the conference on the parties' requests to charge, he explicitly withdrew the request, apparently for strategic reasons (*see* Pepe's Br. at 15 n.). Contrary to Coughlin's present assertion, Judge Frankel did not refuse to give an alibi instruction when it was requested (Coughlin's Br. at 10). He stated that if he gave such an instruction, he would also charge as to the permissible inference of consciousness of guilt from evidence of flight and the use of false names, as requested by the Government. The latter instructions were warranted by the evidence and would have been proper. *See, e.g., United States* v. *Accardi*, 342 F.2d 697, 700 (2d Cir. 1965); *United States* v. *Lefkowitz*, 284 F.2d 310, 315-16 (2d Cir. 1960); *United States* v. *Hines*, 256 F.2d 561, 564 (2d Cir. 1958); *United States* v. *Campisi*, 248 F.2d 102, 107-08 (2d Cir.), *cert. denied*, 355 U.S. 829 (1957); *United States* v. *Waldman*, 240 F.2d 449, 451-52 (2d Cir. 1957). When the request for an alibi instruction was withdrawn, Judge Frankel stated, "If you withdraw it, then I let it go at that," and he did not say that he would have denied the request if the appellants had pursued the matter.

There would have been no ground for appeal if the District Court had given the charges on flight and conceal-

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* Failure to submit a request to charge in writing, prior to the judge's charge, is in and of itself a ground for denying the request. *United States* v. *Gonzalez-Carta*, 419 F.2d 548, 552 (2d Cir. 1969); *cf. United States* v. *Kahaner*, 317 F.2d 459, 477 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

ment, as well as on the alibi defense. Thus, the suggestion that appellants were impermissibly coerced in withdrawing the request is meritless. As previously pointed out, appellants were not entitled to an alibi instruction absent a request for one. Having made a strategic decision to withdraw the request, they are now foreclosed from raising the issue. *See United States* v. *Bacher*, 430 F.2d 663, 664 (5th Cir. 1970).

Appellants also are precluded from raising the issue because, at the conclusion of the Court's charge, they did not except to the failure to give an instruction regarding their alibi defenses. Fed. R. Crim. P. 30; *United States* v. *Harris*, 458 F.2d 670, 678 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972); *United States* v. *Bacher*, 430 F.2d 663, 664 (5th Cir. 1970); *United States* v. *Leach*, 427 F.2d 1107, 1113 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *Caci*, 401 F.2d 664, 669-70 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969).

Appellants contend that two exceptions taken by Coughlin's attorney preserved the issue of the alibi defense instruction for appeal. The argument is not supported by the record. Immediately after the charge, the following exception was taken (Tr. 669):

> Mr. Thau: Your Honor, the Court charged at great length on willfullness and knowingly, and so on, almost presuming that the defendants had been present at the bank, and their intentions were in question or ought to be decided by the jury.
>
> Under these circumstances, I would ask the Court to charge additionally that in the event that they have a reasonable doubt that either or both of these Defendants was at Hyde Part at 11:30 in the morning or thereabouts on October 30, 1972, they should acquit, regardless of anything else in the case.
>
> The Court: Denied.

A similar exception was taken following a supplemental instruction given by Judge Frankel in response to a juror's question (Tr. 685-86).

The instruction requested after the Court's charge was not the alibi instruction requested and withdrawn prior to the charge "to the effect that [the jury] may find that alibi is sufficient to create a reasonable doubt where it otherwise wouldn't have been" (Tr. 558). That is presumably the instruction that appellants now claim should have been given. *See United States* v. *Booz*, 451 F.2d 719, 722-24 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820 (1973); *United States* v. *Megna*, 450 F.2d 511, 512-13 (5th Cir. 1971); *United States* v. *Barrasso*, 267 F.2d 908, 910-11 (3rd Cir. 1959); *United States* v. *Marcus*, 166 F.2d 497, 503-04 (3rd Cir. 1948). Since the District Court had instructed the jury that it must find each element of the crimes charged beyond a reasonable doubt, including, as to the substantive counts "that on October 30, 1972 the Defendants, or the particular Defendant you are considering at any given point, took money from the person or persons of employees of the Empire National Bank . . ." (Tr. 653-54), the language requested by defense counsel after the charge was at best redundant. This is especially so, since, at the appellants' request, the District Court did not instruct the jury on aiding and abetting (Tr. 553-55). Thus, as to Counts Two and Three, the defendants were convicted as principals in the bank robbery.* Under those circumstances, Judge

* In response to a question from a juror, Judge Frankel did give the jury a supplemental instruction on aiding and abetting but specifically limited it to Count Four of the indictment and to Count Two to the extent it charged the use of force and violence or intimidation (Tr. 683-85). Since the jury convicted the appellants on Counts Two and Three, where they were charged with being principals, it must have found beyond a reasonable doubt that they were present at the bank robbery.

Frankel correctly pointed out that it was absurd to suggest that the jury could have convicted the appellants if they were not convinced that they were present at the robbery (Tr. 686).

Pepe's final contention on this issue is that the District Court's failure to instruct the jury on the alibi defense was "plain error" under Fed. R. Crim. P. 52(a). In light of the totality of the District Court's charge, which completely and properly instructed the jury on the applicable legal principles, this argument is frivolous. *See Goldsby* v. *United States*, 160 U.S. 70, 77 (1895); *Roper* v. *United States*, 403 F.2d 796, 798 (5th Cir. 1968); *Lewis* v. *United States*, 373 F.2d 576, 579 (9th Cir.), *cert. denied*, 389 U.S. 880 (1967); *United States* v. *Stirone*, 311 F.2d 277 282 (3rd Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); *cf. Manning* v. *Rose*, Dkt. No. 74-1121 (6th Cir., Dec. 13, 1974) (state trial judge's failure to give an unrequested alibi instruction was not an error of federal constitutional dimensions).*

POINT II

Judge Frankel properly limited the cross-examination of Burton to collateral matters of impeachment.

Appellant Pepe claims it was reversible error for Judge Frankel to restrict his effort to impeach Burton's trial testimony by cross-examining Burton regarding his previously admitted plan to inject a phony defense into one of his previously scheduled bank robbery trials, aborted by Burton's later decision to plead guilty. There was no error.

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* *See also United States* v. *Vigorito*, 67 F.2d 329, 330 (2d Cir. 1933), *cert. denied*, 290 U.S. 705 (1934), where the trial Judge improperly instructed the jury that the burden was on the defendant to prove an alibi that he asserted. The Court of Appeals held that this instruction was error but, since no request had been submitted or exception taken to it and in light of the charge as a whole, the error was not prejudicial.

A trial judge is accorded broad discretion in controlling the scope and length of cross-examination. See *United States* v. *Jenkins*, Dkt. No. 74-2257 (2d Cir., Feb. 10, 1975), slip op. at 1770-71; *United States* v. *Sperling*, Dkt. Nos. 73-2363, *et al* (2d Cir., Oct. 10, 1974) slip. op. at 5647; *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Especially wide latitude is allowed a trial court in placing limitations on cross-examination directed at collateral matters. *Gordon* v. *United States*, 344 U.S. 414, 422-23 (1933); *United States* v. *Hanahan*, 442 F.2d 649, 655 (7th Cir. 1971); *United States* v. *Battaglia*, 394 F.2d 304, 315 (7th Cir. 1968), *cert. denied*, 401 U.S. 924 (1971). In the instant case, Judge Frankel acted well within that broad area of discretion in precluding Pepe's counsel from cross-examining Burton to establish that, before Burton caved in by pleading guilty to the many indictments outstanding against him in 1972-73, he had enlisted the services of a fellow prisoner, Roger Lubesky, to raise a false defense at one of Burton's scheduled bank robbery trials. The plan conceived by Burton was to raise as a defense at trial that Lubesky robbed the bank and then subpoena Lubesky, who had agreed to take the witness stand and claim a Fifth Amendment privilege regarding the robbery. (Tr. 199-201).*

Burton's proposed venture with Lubesky was clearly collateral to the issues before the jury below, which was whether Burton truthfully identified Pepe and Coughlin as his two confederates in the Empire National Bank robbery. Whatever potential value that testimony otherwise may have had to impeach Burton's credibility generally, the

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* Burton and two co-defendants, Arden McCarthy and William McNellis, had been charged with the robbery of the Merchant's National Bank, Manchester, New Hampshire. Burton and McCarthy pleaded guilty and testified for the Government against McNellis. At the latter's trial, Burton admitted the plan to call Lubesky.

record below is surfeit with such impeaching evidence.* Burton's extensive criminal record, which dated back to his teenage years, was exposed on both direct and cross-examination (Tr. 113-22, 150-54, 159-62, 197-203). In addition, the immunity afforded Burton by the Government on eight armed bank robberies, other than the five armed bank robberies to which he had pleaded guilty, in return for his testimony was fully exposed to the jury. Moreover, the jury also had before it the far more pertinent testimony of Anderson Atkinson that Burton, after his indictments in 1972 on the five bank robberies and attempted murders, conceived a plan to cooperate with the Government and frame "Tinkerbell" and other various people in his bank robberies. Contrary to Pepe's claim (Pepe Br. at 22), Burton's plan to obstruct justice by calling Lubesky to improperly invoke the Fifth Amendment at Burton's own trial was not corroborative of Atkinson's testimony about Burton's alleged plan to implicate innocent third parties at other trials and was not at all probative that Burton was prejudiced against either Pepe or Coughlin. *United States* v. *DeSapio,* 456 F.2d 644, 648 and n. 1 (2d Cir.), *cert. denied,* 406 U.S. 933 (1972); see also *United States* v. *Mallah,* 503 F.2d 971, 976-77 (2d Cir. 1974). Given the abundance of impeaching evidence, the jury was certainly possessed of sufficient information to make a "discriminating appraisal" of Burton's motives for testifying. *United States* v. *Blackwood,* 456 F.2d 526, 530 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972). The ruling below was neither erroneous nor prejudicial.

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* Not to be overlooked in assessing the propriety of excluding this collateral evidence is the well-established principle that a witness cannot be impeached as to general acts of misconduct not resulting in a conviction. *United States* v. *Miles,* 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Kahan,* 479 F.2d 290, 294-95 (2d Cir. 1973), *rev'd on other grounds,* 415 U.S. 239 (1974); *United States* v. *Sposato,* 446 F.2d 779, 780-81 (2d Cir. 1971); *United States* v. *Owens,* 263 F.2d 720 (2d Cir. 1959); *United States* v. *Provoo,* 215 F.2d 531 (2d Cir. 1954). Even the new Federal Rules of Evidence, cited by Pepe although not in effect at the time of trial below, would permit the limitation imposed by Judge Frankel. See Rule 608(b).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PAUL VIZCARRONDO, JR., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28TH day of FEBRUARY, 1975, he served ~~a copy~~ TWO COPIES of the within BRIEF by placing the same in ~~a~~ properly postpaid franked envelopes addressed:

DAVID BLACKSTONE, ESQ.
401 BROADWAY
NEW YORK, N.Y. 10013

PHYLIS SKLOOT BAMBERGER, ESQ.
FEDERAL DEFENDER SERVICES UNIT
509 UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

And deponent further says that he sealed the said envelopes and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Paul Vizcarrondo

Sworn to before me this
28th day of February 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975